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RICHARD M. RIEHL

January 6, 1995

Our File No.
1162-101-71

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: MM Docket No. 93-158
RM No. 8239
Hazlehurst, Utica, and Vicksburg, Mississippi

Dear Mr. Caton:

On behalf of Donald Brady please find enclosed an original and four copies of his Reply to Opposition to Petition for Reconsideration in the above-referenced proceeding.

Kindly communicate any questions directly to this office.

Yours very truly,

Richard M. Riehl

Enclosures

RMR/das

Before The

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MM Docket No. 93-158
Table of Allotments	)	RM No. 8239
FM Broadcast Stations,	)	
	)	
Hazlehurst, Utica and	)	
Vicksburg, Mississippi	)	

TO: Chief, Mass Media Bureau

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Pursuant to Section 1.106 of the Rules, Donald Brady ("Brady"), by his attorneys, hereby Replys to the Opposition of Willis Broadcasting Corporation ("Willis"), filed on December 22, 1994, to Brady's Petition for Reconsideration of the *Report and Order* in the above-captioned matter (DA-94-1201) Released November 3, 1994 ("R&O").

Introduction

Mr. Brady sought reconsideration of the R&O because the R&O failed to consider material filed by Brady demonstrating that the portions of the Notice of Proposed Rulemaking ("NPRM") (paragraph 3) which set forth the parameters for participation by interested parties had become

"final" and so could not be modified and that his expression of interest was in fact timely filed.[1]

Willis, in opposition to Brady's Petition for Reconsideration argues three essential points: (1) the NPRM was not a Final Order and was thus correctable; (2) the Commission properly refused to accept Brady's timely received Comments because someone in the Commission didn't present it to the "Secretary" until the next day; and (3) the Petition for Reconsideration is repetitious. As will be demonstrated below, Willis is wrong on all counts and therefore reconsideration should be granted.

The Portion of the NPRM That Fixed Rights Of Participation Is a Final Order

In response to Brady's demonstration that portions of NPRM were "Final" Orders, Willis contends, without the citation of any authority, that an NPRM could never be a "Final Order" because of the very nature of rulemaking proceedings. (Opposition, p. 3). On the other hand, Willis argues that the NPRM fixed the time for filing Comments and that failure to timely file such comments foreclosed that party's participation in the proceeding. (Opposition, p. 5-7). Willis, it is submitted, can't have it both ways. If portions of the NPRM were "Final" as to Brady, it must follow that NPRM's do contain elements of finality, even though the portion containing the allocation proposal may be only prospective in nature.

Moreover, channel allocation proceedings, unlike general rulemakings, also involve the resolution of conflicting private claims to a

[1] Mr. Brady, at the commencement of this proceeding, appeared pro se and made his submissions in accordance with instructions given him when he telephoned the Commission.

valuable privilege. *Sagamon Valley Broadcasting*, 269 F.2d 221, 224 (D.C. Cir. 1959) and contain elements of "finality" not usually seen in general NPRMs. Further, in such proceedings, any submission made after dates fixed by statute, rule or in the NPRM may not be considered. 269 F.2d at 225.

Willis does not dispute that its submissions claiming that this proceeding involved an "incompatible channel swap" were filed long after the period allowed by 47 U.S.C. § 405 to obtain reconsideration of a direction in the NPRM it later claimed to be erroneous.[2] Namely:

> 3... should another party indicate an interest in the C3 allotment at Utica, the modification cannot be implemented unless an equivalent Class channel is also allotted.

8 FCC Rcd. at 4080. This NPRM paragraph clearly invited expressions of interest by other interested persons and put Willis expressly on notice that if an expression of interest was received Willis would have to demonstrate the existence of another Class C 3 channel at Utica or the proceeding would be terminated. This paragraph thus unequivocally fixed the rights and obligations of the proponents as well as any other interested parties.[3]

As Willis correctly notes, had Mr. Brady not timely filed this expression of interest he would have been foreclosed from participation

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[2] The staff clearly considered Willis' late filed arguments and modified the NPRM accordingly, yet refused to entertain Mr. Brady's timely response to these submissions because they were beyond the Comment period (R&O, p. 1, note 5).

[3] "[F]inal orders are not limited to the last order issued in a proceeding, but to be final an order must 'impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.'" *Bethesda-Chevy Chase Broadcasters, Inc. v. FCC*, 385 F.2d 967, 968 (D.C. Cir. 1967) (quoting *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 113, 68 S.Ct. 431, 437, 92 L.Ed. 568 (1948)); *see also Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397, 402 (D.C. Cir. 1975).

in this proceeding. But Brady filed an expression of interest and Willis, or its predecessor in interest, were served. They thus knew of it and also had to know of the requirements imposed on them by Paragraph 3 of the NPRM, if they desired the proceeding to continue.

One of the criteria for determining "finality" where non-final actions are involved, is "whether the agency action has the force of law, regardless of whether further administrative proceedings are necessary to implement the agency decision." *Potomac Electric Power Co. v. I.C.C.*, 702 F.2d 1026, 1030 (D.C. Cir. 1983) citing *Abbott Laboratories v. Gardner,* 387 U.S. 136, 149-50, 18 L.Ed. 2nd 681, 692. NPRM paragraph 3, it is submitted, did just that.

If Willis believed NPRM paragraph 3 was in error, it was required to bring this error to the Commission's attention within the time specified in 47 U.S.C. § 405 or its right to make such arguments would be lost. *Action for Children's Television, Inc. v. F.C.C.*, 906 F.2d 752, 754-55 (D.C. Cir. 1990). (Failure to bring error to FCC's attention within the period prescribed in 47 U.S.C. § 405 precludes later consideration.).[4]

Willis thus knew what had to be done. Either show the availability of another Class C3 channel at Utica as mandated by NPRM paragraph 3 or seek reconsideration of the NPRM during the period specified in 47 U.S.C. § 405(a). Willis did neither. No one disputes that the NPRM was promulgated in accordance with applicable rules and statutes. Further, the mandate in NPRM paragraph 3 was usual and proper in proceedings such as this. Consequently, once the reconsideration period had past, any attempt to modify the Order is void *ab initio.* *Hughes Moore*

[4] " . . . Section 405(a) applies to procedural issues in the rulemaking context." *Id.* at 755.

Associates, 7 FCC Rcd. 1454, 1455 (1992). *Accord Reuters Ltd. v. FCC* 781 F.2d 946 (D.C. Cir. 1986) (once an Order, issued in accordance with the Commission's Rules, becomes final, the agency may not set it aside).

The R&O's failure to implement the NPRM as mandated by paragraph 3 and its holding that no other expressions of interest would be considered were simply contrary to the NPRM and thus must be set aside.

Brady's Comments Were Timely Filed

Willis does not dispute that Mr. Brady's comments were received at the Commission, via electronic means, several hours before the close of business on August 9, 1993, the due date for Comments in this proceeding. Willis nevertheless argues that the Rules don't contemplate the facsimile filing of entire documents and that Mr. Brady, appearing pro se, had to know he was at risk if he did not ensure that his comments were, in effect, hand carried to the Secretary's office (Petition, p. 5-6). Who's kidding who?

Willis knows there is no rule or even practice that mandates the Secretary be hand served with such filings. In fact, there are literally thousands of filings annually, addressed to the Secretary, that are received at the Commission via the U.S. Postal Service and none are delivered directly to the Secretary's office. Yet, as long as such filings arrive at the Commission on the due date they are accepted as received by the Secretary on the date of arrival. There is no reason to treat electronic (facsimile) filings any differently than regular mail.

More fundamentally, a rule specifically barring facsimile fillings would have to be adopted and NPRMs and similar FCC actions would

have to carefully note that such filings are precluded before such statutory rights of participation can be cut-off. How else would any individual attempting to deal with the Commission directly (especially an individual acting pro se) know such filings are at risk, if not barred? Particularly when, as here, Mr. Brady did by electronic (facsimile) filing what is regularly done by mail.

Moreover, contrary to Willis' contentions, the Commission's Rules are less than silent on this subject. Section 1.52 specifically states:

> ... Either the original document or an electronic reproduction of such original document containing the facsimile signature of the ... unrepresented party is acceptable for filing.... (Emphasis added)

Section 1.420 says comments must be filed with the "Commission." Even the NPRM only uses the permissive "should" when specifying the Secretary's office as the ultimate repository.

In short, the Commission's rules appear to contemplate electronic (facsimile) filings. Absent a rule specifying entirely different procedures for such filings, then what is an acceptable practice for regular mail filings must be equally acceptable for electronic (facsimile) filings.

The risk in either instance is that the filing arrive at the Commission on or before the due date. Mr. Brady's Comments, addressed to the Secretary, were in fact received at the Commission several hours before the close of business on the due date. Therefore, consistent with long standing practice at the Commission, those comments were in fact timely filed and so had to be considered.

The Petition For Reconsideration Was Not Repetitious

Willis also contends that the Petition for Reconsideration should be dismissed as repetitious because all of Mr. Brady's contentions had been lodged (although not considered) with the Commission during the course of this proceeding. (Opposition, p. 4-5). Willis concedes that these contentions were not addressed (Opposition, p. 5, n.3).

Willis is wrong again. *Action for Children's Television supra,* 906 F.2d at 754-55 makes clear that where arguments and contentions are not addressed in a Report and Order reconsideration must be sought in order to preserve that party's rights. Brady has done this -- Willis did not.

Conclusion

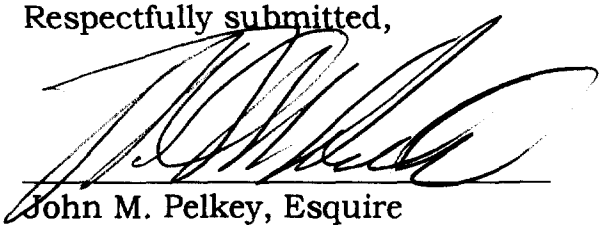
Willis, although contending that an NPRM cannot contain elements of "finality", cites no authority to support this contention and, inconsistently, argues that the filing deadlines specified in the NPRM are, in effect "final". Long standing precedent established, however, that such provisions are "Final Orders" and once the period for reconsideration has passed, they may not be modified.

Further, Willis' contention that the only acceptable means of making a timely electronic filing is to have the document hand delivered to the Secretary's office is pure nonsense. Nothing in the Rules specify how any filing is to be lodged with the Secretary. Regular mail is accepted as filed on the date it is received at the Commission - not the day it is physically delivered to the Secretary. In the absence of a rule to the contrary and clear notice that such permissible electronic (facsimile)

filings require different treatment[5], such filings must be accorded the same treatment any other routine filing receives at the Commission. Since Mr. Brady's Comments were timely received at the Commission they should have been accepted and considered.

In view of the foregoing, the arguments contained in the Opposition must be rejected and reconsideration of the R&O should be granted in order to correct fundamental errors of law and practice contained therein.

Respectfully submitted,



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January 6, 1995

[5] See, for example, the rules and notices with respect to fee filings in Pittsburgh.

CERTIFICATE OF SERVICE

I, Dawn A. Smith, an employee in the law offices of Haley, Bader & Potts, hereby certify that I have on this 6th day of January, 1995, sent copies of the foregoing "REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION" by first-class United States mail, postage prepaid, to the following:

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*Hand Delivered